



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2004

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County - Civil Section
300 Dolorosa, Suite 4049
San Antonio, Texas

OR2004-6343

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206093.

The Bexar County District Attorney's Office (the "district attorney") received a request for a copy of all documents contained in a specified case file. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes a court-filed document that is expressly public under section 552.022 of the Government Code. This document may not be withheld unless it is confidential under other law. *See* Gov't Code § 552.022(a)(17). Sections 552.103, 552.108, and 552.111 are discretionary exceptions that protect a governmental body's interests and may be waived. As such, sections 552.103, 552.108, and 552.111 are not other law that makes information confidential for the purposes of section 552.022. *See* Open Records Decision No. 177 (1977) (law enforcement exception may be waived by governmental body); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the court-filed document we have marked may not be withheld pursuant to sections 552.103, 552.108 or 552.111. We note that the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of

section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure only apply to "actions of a civil nature." *See* Tex. R. Civ. P. 2. Accordingly, we find that the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to this particular information. Consequently, the district attorney must release the section 552.022 information that we have marked to the requestor in its entirety.

We next address your section 552.111 claim with regard to the remaining submitted information. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Evidence. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

Tex. R. EVID. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

If a requestor seeks an attorney's entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes). You note that the present request encompasses the district attorney's entire litigation file. Furthermore, you have demonstrated that the file was created in anticipation of litigation. Therefore, we conclude that the district attorney may withhold the file from disclosure under section 552.111 of the Government Code. See *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)) (the work product doctrine under section 552.111 is applicable to litigation files in criminal as well as civil litigation).

In summary, the marked court document must be released pursuant to section 552.022(a)(17). The district attorney may withhold the remaining submitted information pursuant to section 552.111 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free,

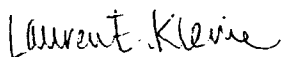
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/seg

Ref: ID# 206093

Enc. Submitted documents

c: Mr. Phil Watkins
Phil Watkins, P.C.
700 North St. Mary's Street
San Antonio, Texas 78205
(w/o enclosures)